

Kravchuk v. Mukasey, No. 04-70190

JAN 10 2008

WARDLAW, Circuit Judge, dissenting.

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I respectfully dissent.

Here, the IJ found Kravchuk credible. As the majority notes, the IJ committed legal error by then conflating the question whether Kravchuk suffered past persecution with whether evidence of changed country conditions rebutted the presumption that necessarily flows from a finding of past persecution. *Hanna v. Keisler*, 506 F.3d 933, 938 (9th Cir. 2007). The majority's attempt to rescue the IJ from her erroneous view of the law by employing harmless error analysis finds no support in our jurisprudence. "Harmless error" is not the standard by which we review the IJ's decision. Rather we must ask whether the decision is supported by substantial evidence. *See I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

Substantial evidence does not support the IJ's conclusion. The 1978, 1986 and 2000 incidents amount to past persecution under our precedents. The 2000 event alone, where members of the Security Service of Ukraine knocked Kravchuk unconscious for his failure to cooperate with the government in hunting down members of his unregistered Baptist church, establishes past persecution. *See Chand v. I.N.S.*, 222 F.3d 1066, 1073 (9th Cir. 2000) (noting that "physical harm has consistently been treated as persecution" before analyzing changed country conditions). Moreover, that this event occurred long after the fall of the Soviet

Union demonstrates that country conditions have not changed in a manner that precludes persecution of evangelicals.

Because the record compels a finding that Kravchuk was persecuted on account of his religious beliefs, the IJ committed legal error in her analysis and the IJ found Kravcuk credible, I would hold that a presumption of future persecution has arisen. I would remand this petition to the BIA for an express determination as to whether the government has sufficiently rebutted this presumption with evidence of changed country conditions.